

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

State Senator Scott Newman and State  
Senator Mike Parry,  
Complainants,

vs.

Mark Ritchie, Minnesota State Secretary  
of State,

Respondent.

**NOTICE OF DETERMINATION OF  
PRIMA FACIE VIOLATION  
AND  
NOTICE OF AND ORDER FOR  
PROBABLE CAUSE HEARING**

**TO: Parties**

On October 4, 2012 State Senators Scott Newman and Mike Parry filed a Campaign Complaint with the Office of Administrative Hearings alleging that Secretary of State Mark Ritchie violated Minn. Stat. §§ 16A.139, 43A.38, 211B.04, 211B.06, and 211B.09 by using his official governmental website to disseminate campaign material designed to defeat a question on the ballot for the upcoming general election proposing a constitutional amendment on elections.

Specifically, the Complaints allege that by using his official website for that political purpose, Secretary Ritchie was illegally using state funds for a purpose for which it was not appropriated in violation of Minn. Stat. § 16A.139. The Complaint also alleges that Secretary Ritchie used state time, supplies, and state-owned or leased property and equipment for his private interests in violation of Minn. Stat. § 43A.38, subd. 4. The Complaint also alleges that when he used his official website for that private political, Secretary Ritchie failed to include a disclaimer required by Minn. Stat. § 211B.04; that he prepared and disseminated false campaign material in violation of Minn. Stat. § 211B.06; and that he violated Minn. Stat. § 211B.09 by using his authority or influence to “compel” members of his staff to take part in a political activity.

After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge (ALJ) has determined that the Office of Administrative Hearings lacks jurisdiction over the alleged violations of Minn. Stat. §§ 16A.139 and 43A.38, but that the Complaint does set forth *prima facie* violations of Minn. Stat. §§ 211B.04, 211B.06, and 211B.09.

**THEREFORE, IT IS ORDERED AND NOTICE IS GIVEN**

(1) That the claims filed by State Senators Scott Newman and Mike Parry against Secretary Ritchie alleging violations Minn. Stat. §§ 16A.139 and 43A.38 are **DISMISSED** for lack of jurisdiction; and

(2) That this matter hereby is scheduled for a probable cause hearing on the alleged violations of Minn. Stat. §§ 211B.04, 211B.06, and 211B.09, to be held by telephone before the undersigned Administrative Law Judge at **10:00 a.m. on Friday, October 12, 2012**. The hearing will be held by call-in telephone conference. You must call: **1-888-742-5095** at that time. When the system asks for your numeric pass code, enter **685-684-1864#** on your phone and you will be connected to the conference. The probable cause hearing will be conducted pursuant to Minn. Stat. § 211B.34. Information about the probable cause proceedings and copies of state statutes may be found online at [www.oah.state.mn.us](http://www.oah.state.mn.us) and [www.revisor.leg.state.mn.us](http://www.revisor.leg.state.mn.us).

At the probable cause hearing all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if that choice is not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. Parties should provide to the Administrative Law Judge all evidence bearing on the case, with copies to the opposing party, before the telephone conference takes place. Documents may be emailed to Judge Johnson at [Bruce.Johnson@state.mn.us](mailto:Bruce.Johnson@state.mn.us) or faxed to 651-361-7936.

At the conclusion of the probable cause hearing, the Administrative Law Judge will either: (1) dismiss the complaint based on a determination that the complaint is frivolous, or that there is no probable cause to believe that the violation of law alleged in the complaint has occurred; or (2) determine that there is probable cause to believe that the violations of law alleged in the complaint have occurred and refer the case to the Chief Administrative Law Judge for the scheduling of an evidentiary hearing. Evidentiary hearings are conducted pursuant to Minn. Stat. § 211B.35. If the Administrative Law Judge dismisses the complaint, the complainant has the right to seek reconsideration of the decision on the record by the Chief Administrative Law Judge pursuant to Minn. Stat. § 211B.34, subd. 3.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at P.O. Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TDD).

Dated: October 9, 2012

s/Bruce H. Johnson  
BRUCE H. JOHNSON  
Administrative Law Judge

## MEMORANDUM

### OAH Lacks Jurisdiction over the Alleged Violations of Minn. Stat. §§ 16A.139 and 43A.38

The jurisdiction of Office of Administrative Hearings (“OAH”) is limited to matters that the Legislature has specifically designated in a statute. Minn. Stat. § 211B.32, subd. 1, give OAH jurisdiction to adjudicate alleged violations of chapters 211A or 211B. It does not give OAH jurisdiction to hear and adjudicate claims arising under any other chapters of Minnesota Statutes. Moreover, nothing in any other provision of Minnesota Statutes gives OAH authority to initiate and adjudicate alleged violations of Minn. Stat. §§ 16A.139 and 43A.38. OAH therefore lacks jurisdiction over any such claims raised in the Complaint.

### Standard of Review

To set forth a *prima facie* case that entitles a party to a hearing, the party must either submit evidence or allege facts that, if unchallenged or accepted as true, would be sufficient to prove a violation of chapters 211A or 211B.<sup>1</sup> For purposes of a *prima facie* determination, the tribunal must accept the facts alleged as true and the allegations do not need independent substantiation.<sup>2</sup> A complaint must be dismissed if it does not include evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of chapters 211A or 211B.<sup>3</sup>

### Minn. Stat. § 211B.04 Allegation

Minn. Stat. § 211B.05, subd. 2, defines “campaign material” as “Campaign material” as “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.” The Complaint alleges that material in Secretary Ritichie’s official website referring to Proposed Constitutional Amendment on Elections in the upcoming election is designed to defeat that ballot issue and is, therefore, “campaign material,” within the meaning of Minn. Stat. § 211B.05, subd. 2.

Minn. Stat. § 211B.04(a) provides:

(a) A person who participates in the preparation or dissemination of campaign material other than as provided in section 211B.05, subdivision 1, that does not prominently include the name and address of the person or committee causing the material to be prepared or disseminated in a disclaimer substantially in the form provided in paragraph (b) or (c) is guilty of a misdemeanor.

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<sup>1</sup> *Barry, et al., v. St. Anthony-New Brighton Independent School District, et al.*, 781 N.W.2d 898, 902 (Minn. App. 2010).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

The Complaint alleges that Secretary Ritchie has violated Minn. Stat. § 211B.04(a) by failing to include the required disclaimer in an appropriate place on his website.

The Administrative Law Judge finds that the Complaint has alleged sufficient facts to support finding a prima facie violation of Minn. Stat. § 211B.04.

### **Minn. Stat. § 211B.06 Allegation**

The Complaint also alleges that campaign material that Secretary Ritchie disseminated on his official website pertaining to the upcoming ballot question contains a number of false statements with respect to the effect of that ballot question. Minn. Stat. § 211B.06 prohibits the preparation and dissemination of false campaign material with respect to the effect of a ballot question. In order to be found to have violated this section, a person must intentionally participate in the preparation or dissemination of campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

As interpreted by the Minnesota Supreme Court, Section 211B.06 is directed against false statements of specific facts.<sup>4</sup> It does not prohibit inferences or implications, even if misleading. Moreover, the burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.<sup>5</sup>

To prove a violation at the hearing, the Complainants must show that the statement is substantively false and that the person or persons who prepared, disseminated or broadcasted the advertisement did so knowing it was false or communicated it with reckless disregard of whether it was false. The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.<sup>6</sup> Based on this standard, the Complainants has the burden to prove by clear and convincing evidence that the Respondent prepared or disseminated the statement knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainants must come forward with sufficient evidence to prove the Respondent “in fact entertained serious doubts” as to the truth of the ad or acted “with a high degree of awareness” of its probable falsity.<sup>7</sup>

The Administrative Law Judge finds that the Complaint has alleged sufficient facts to support finding a prima facie violation of Minn. Stat. § 211B.06.

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<sup>4</sup> *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981); See, *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language); *Bank v. Egan*, 60 N.W.2d 257, 259 (Minn. 1953); *Hawley v. Wallace*, 163 N.W. 127, 128 (Minn. 1917).

<sup>5</sup> *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

<sup>6</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>7</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.), *rev. denied* (Minn. 2006).

## **Minn. Stat. § 211B.09 Allegation**

Minn. Stat. § 211B.09 provides as follows:

An employee or official of the state or of a political subdivision may not use official authority or influence to compel a person to apply for membership in or become a member of a political organization, to pay or promise to pay a political contribution, or to take part in political activity. A political subdivision may not impose or enforce additional limitations on the political activities of its employees.

In order to allege a *prima facie* violation of Minn. Stat. § 211B.09, the Complainants must put forward facts that would support finding the Respondent used his authority or influence to “compel” persons to become members of a political organization, pay political contributions, or take part in a political activity. The Merriam Webster Dictionary defines “compel” to mean “to drive or urge forcefully or irresistibly;” or “to cause to do or occur by overwhelming pressure.”<sup>8</sup>

The Complainants allege that Secretary Ritchie required employees in his office to assist him in maintaining the official website that he was using to disseminate campaign material designed to defeat a ballot question. That allegation is sufficient to support a *prima facie* violation of Minn. Stat. § 211B.09.

## **Conclusion**

The Administrative Law Judge finds that the Complainants have alleged sufficient facts to support finding a *prima facie* violations of Minn. Stat. §§ 211B.04, 211B.06, 211B.09. Accordingly, Complainants allegations will proceed to a probable cause hearing as ordered.

**B. H. J.**

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<sup>8</sup> Merriam Webster Online Dictionary (2012).